

'Two In One' Regulating Two Business Entities under One Statute; Labuan Limited Partnership and Limited Liability Partnerships Act 2010.

ABSTRACT

In Malaysia, the business vehicles are merely confined to sole proprietorships, partnerships and company. However, in its offshore, Labuan, there are additional business vehicles which are offered, namely limited partnerships (LP) and limited liability partnerships (LLP). Recently, Labuan regulatory centre, LOFSA came out with a new and inimitable statute known as Labuan Limited and Limited Liability Partnership Act 2010 which is a unique legislation as it combines the laws for two business vehicle; limited partnership (LP) and limited liability partnerships (LLP) under one statute. In other countries, the limited partnerships and limited liability partnerships are regulated under different statutes as they are different both in substance and in practice. This paper intends to discuss the main features of Labuan Limited Partnership and Limited Liability Partnerships Act 2010 and to highlight the distinctiveness of this new business law. Research methodology adopted for this paper is mainly statutory analysis.

Key words: Labuan, limited partnerships, limited liability partnerships conference category: Business and finance

INTRODUCTION

On April 16, 1984 Labuan was declared a Federal Territory and subsequently on Oct 1, 1990, the Government of Malaysia declared the Federal Territory of Labuan as an International Offshore Financial Centre (IOFC). As an integrated IOFC, Labuan offers a wide range of offshore financial products and services to customers worldwide, including banking and investment banking, insurance, captives, trust business, fund management, investment holding, company management and Islamic financing. On 15th February 1996, the Labuan Financial Services Authority (LFSA), formerly known as Labuan Offshore Financial Services Authority (LOFSA) was established as a as a single regulatory body to spearhead and coordinate efforts to promote and develop Labuan as an International Business & Financial Centre (IBFC). Its establishment further underscores the government's commitment to make Labuan a premier IBFC of high repute.

In 2009, new legal frameworks were tabled and approved by the Parliament of Malaysia. Four legislations are retained with amendments; the Labuan Financial Services Authority Act 1996, Labuan Companies Act 1990, Labuan Trust Act 1996 and Labuan Business Activity Tax Act 1990. In addition, four new legislations were introduced: Labuan Limited Partnerships and Limited Liability Partnerships Act 2010, Labuan Financial Services and Securities Act 2010, Labuan Foundations Act 2010, Labuan Islamic Financial Services and Securities Act 2010 and Labuan Foundations Act 2010. The new framework provides Labuan IBFC with updated legislation that is flexible and conducive for the conduct of international business. Among the highlights of the new legislation is the name change from Labuan Offshore Financial Services Authority (LOFSA) to Labuan Financial Services Authority (Labuan FSA). This is in line with the strategic direction to reposition Labuan as an international business and financial centre. Consequently, all reference to the term “offshore” was deleted from Labuan laws and the distinction between Labuan and domestic markets was made through the term “Labuan” with clear provisions on the applicability of relevant law, domestic or otherwise. The new laws allowed for a wider range of entities that may be established in Labuan IBFC, such as Labuan Protected Cell Companies (PCCs), Labuan Special Trusts and Labuan Foundations. A notable development is the introduction of the Labuan Islamic Financial Services and Securities Act 2010 (LIFSSA). This legislation is designed to cater to the demands of Islamic finance, one of the fastest growing industries globally. It complements the conventional law for financial services that is the Labuan Financial Services and Securities Act 2010 (LFSSA) by providing the platform to create Shariah-compliant entities and the enhanced roles and functions of the Shariah Supervisory Council.

This paper shall focus on one of the new legislations introduced by Labuan FSA; the Labuan Limited Partnerships and Limited Liability Partnerships Act 2010, which is a unique legislation as it regulated two entities at the same time; the Labuan limited partnership (LP) and a new business entity, the Labuan limited liability partnerships (LLP).

Labuan limited partnerships

The limited partnerships in Labuan were mainly introduced to attract more investment by providing more options of business vehicles. The structure of Labuan limited partnership is generally similar to the UK's offshore limited partnerships, for example the Jersey, Guernsey and Isle of Man limited partnerships. In the UK, although the offshore limited partnerships are generally similar to the mainland partnerships, there are some distinguishable criteria, for example unlike the mainland limited partnerships; the offshore limited partnerships allow a person to become both the general and limited partners. In such a case, the person can limit his liability up to certain amount as a limited partner but at the same time take part in the management of the firm. This criterion is equally applicable in the Labuan limited partnerships.

The offshore limited partnership in Labuan must consist of not fewer than two and not more than 50 partners. There must be at least one general partner. For professional limited partnerships, the partners cannot be a corporation and shall have in force professional indemnity insurance cover for an amount not less than the prescribed amount with any insurer approved by the Authority.

Registration

Under the LLP and LLPA 2010, a limited partnership must be formally registered with Labuan Financial Services Authority (LFSA). LFSA shall not register an offshore limited partnership unless a partnership agreement which is duly executed has been submitted to the authority. Upon compliance of the registration requirement, LOFSA will issue a certificate which shall be conclusive evidence that an offshore limited partnership has been legally registered. Nonetheless, the certificate shall be valid and effective for a period not exceeding one year from the date of registration or as may be specified in the certificate. This means, the certificate of registration for offshore limited partnerships must be renewed annually. Upon registration, the name Labuan limited partnership shall end with words "limited partnership" in full or the abbreviation "limited partnership", "LP", "L.P" or any other form of abbreviation in romanised character or words in the national language of a country which connotes a limited partnership or any abbreviation thereof as may be approved by the authority. The words "limited partnership" in full or the

abbreviation “limited partnership” The name of a limited partner or a body corporate shall not appear in the name of a Labuan limited partnership unless it is also the name of one of the general partners or the Labuan limited partnership has been carried on under that name before the admission of that partner or corporate partner as a limited partner.

Type of partners

Labuan LP requires a composition of two types of partners that is general partners and limited partners. A general partner essentially has all the rights and powers and shall be subject to all the restrictions and liabilities similar to a partner in general partnerships but despite the vast authority given to them, general partners can not act without the written consent or ratification by all limited partners, in certain matters, namely:

- (a) To do an act this makes it impossible to carry on the activities of the offshore limited partnership;
- (b) to possess any offshore limited partnership property, or dispose of any rights in any offshore limited partnership property, for other than a partnership purpose; or
- (c) to admit a person as a general partner or admit a person as a limited partner, unless the right to do so is given in the partnership agreement.

As for the limited partners, the Act clearly stated that they have no management rights and if they participated in the management of the firm, limited partners will lose their status as limited partners and become general partners. Nonetheless, the limited partners have all the rights the partnerships books and true account of the business affairs. Limited partners also can lend or borrow money from the firm and enter into transactions with the firm. In such cases, except where the limited partner is also a general partner, the limited partners claim against the assets of the offshore limited partnership shall rank them as creditors of the firm.

Liability of partners

In the Labuan LP, the general partners have unlimited liability towards the business debts similar to partners in general partnerships. On the other hand the limited partners

shall not be liable for the debts or obligations of the offshore limited partnership provided that they have fully paid their contribution as specified in the partnerships agreement. The Act also clearly provides that if limited partners participate in the management of the firm, they will lose their limited liability shield and become liable as general partners.

The internal relation between partners

The internal regulation of limited partnerships is generally similar to general partnerships except for the composition of partners. As the general partners in LP have similar rights and terms as partners in the general partnerships, the LLP and LLPA 2010 does not specify any provision to regulate internal relations between the general partners. On the other hand, the Act clearly provides for relation between the limited partners inter-se.

Taxation

In 2002, when the Labuan Offshore Business Activities Tax Act (LOBATA) 1990 was amended, the Labuan limited partnerships was included in the definition of offshore companies and as such has a tax status as company. However, with the amendment of Labuan Business Activities Tax Act 1990 in 2010, Labuan limited partnerships is categorized as Labuan entity and therefore, shall be the person assessable and chargeable to tax under the Act. In Labuan, tax shall be charged at the rate of three per cent for a year of assessment upon the chargeable profits of a Labuan entity carrying on a trading activity for the basis period for that year of assessment whilst a Labuan entity carrying on non-trading activity for the basis period for a year of assessment shall not be charged to tax for that year of assessment.

Dissolution of the LP

Generally, the power to dissolve the LP is only vested in the general partners as it forms part of the management rights. The LP and LLPA 2010, clearly provides that in the

event of the dissolution of a Labuan limited partnership, its affairs shall be wound up by the general partners.

The Act also expressly stated that a limited partner shall not be entitled to dissolve a Labuan limited partnership by notice except as expressly provided in the partnership agreement or as provided under subsection 26(3). As for the general partners, they have the right to dissolve by notice but the notice would not take effect until it is filed with the authority.

The LP and LLPA 2010 also provide that, the LP shall be dissolve:

- (a) Where the sole or last remaining general partner is an individual, his death, legal incapacity, bankruptcy, retirement or withdrawal from the offshore limited partnership; or
- (b) where the sole or last remaining general partner is a body corporate, its dissolution, bankruptcy or withdrawal from the offshore limited partnership, other than the giving rights of dissolution to the general partners, the Act also provides that upon application of any partner (this means either general or limited partners), the LP may be dissolve by the order of the court.

Differences between Labuan limited partnership and general partnerships

In a general partnership, the law states that there must be agreement between two or more persons to carry on business in common with a view of profit. Once all these elements are present, there is a valid partnership even though the business arrangement is not registered or no formal business name is used. As long as all the elements prescribed by the Partnership Act are fulfilled, a partnership can validly exist despite non-registration.

Although under the Registration of Businesses Act (RBA) partnership is required to be registered, the registration is merely evidence that there is partnership business but a firm existence does not depend upon registration. A partnership can still validly exist even though it was not properly registered. Non-registration does not affect the enforcement of partners' rights amongst themselves or the right of a third party to sue the firm. However, for limited partnerships, formal registration is very important. The law requires that LP must be formed in the manner provided by the Act and registration of

the firm is a condition for the limited partners to get the advantages of limited liability. Failure to register the limited partnership will render the firm as a general partnership and all partners are deemed as general partners, with unlimited joint and several liabilities for the firm's debts. For this reason, a contract to form a limited partnership will normally specify that the firm is not to come into existence or commence trade until it is duly registered.

Another difference between limited partnerships and limited partnerships is on the management rights. In general partnerships, all partners have the right to decide for the business. In matters concerning the nature of the firm, consent of all partners must be obtained whilst in ordinary matters concerning the business, decision of the majority is sufficient. On the other hand, in limited partnerships, the management rights are only vested in general partners whilst limited partners are not entitled to take part in the management of the firm. A limited partner who refused to adhere to the restriction by taking part in the management will be lifted from the protection of limited liability and will have unlimited liability similar to general partners.

Another difference between limited partnerships and general partnerships lie in the issue of partners' liability. In general partnerships, partners have unlimited liability towards debts of the firm. In the case where the firm's assets are not sufficient to pay the debts of the firm, a partner's personal property can be seized. In addition, as the firm is a collective of all partners, debts of the firm are actually debts of all partners. Where as in limited partnerships, some of the partners, referred to as limited partners, are allowed to limit their liability in the firm. However, the structure of limited partnership does not allow all partners to have limited liability. The law requires that there must be a composition of both general and limited partners in a limited partnership. An interesting feature about the LP and LLPA 2010 is that it expressly allows a person to become both the general and limited partners. In such a case, the person can limit his liability up to a certain amount as a limited partner but at the same time takes part in the management of the firm.

Limited liability partnerships (LLP)

LLP is a business structure that combines the best features of partnerships and company. It enjoys all the attributes of a body corporate, namely, separate legal entity, limited liability, perpetual succession and legal entity but at the same time retaining the internal flexibility of a partnership.

There are two types of LLPs; the first one is LLP with the status of a legal person but not a body corporate and the other one is LLP with the status of a body corporate. For the purpose of discussion, references shall be made to the United Kingdom where both types of LLPs are available.

The Jersey LLPs

The Isle of Jersey is a constituent of the United Kingdom but with a crown dependency enjoying substantial measure of autonomy. The Isle of Jersey possesses a full-fledged court system (with the right of appeal to the Privy Council), its own unicameral legislature (the states) and an executive branch of government which takes the form of de facto groups of insular officials and presidents of principal committees of the states. The principal sources of law for the island are the Jersey common law, which originated from the customary law of the Duchy of Normandy. Legislation enacted by the Westminster only applies to Jersey if expressly stated or if it does so by necessary implication. Other than having powers of self-government, Jersey which is subject to the Community law enjoys free movement of industrial and agricultural produce but is otherwise exempted from most of the EC law, including free movement of persons and tax harmonization. Consequently, Jersey is able to thrive as an offshore financial center with a fiscal structure and portfolio of legal vehicles attractive to manage funds and wealthy individuals.

The limited liability partnerships (Jersey) law was enacted and enforced in 1997. Similar to the UK LLP, the Jersey LLP has a separate legal entity, distinct from its partners. However, different from the UK LLP, it does not have the status of a body corporate. The safeguard mechanism for the Jersey LLP is a requirement of £5 million of financial provision upon registration; where one or more banks or insurance companies on the Island are required upon dissolution of the LLP, to pay the person

responsible for the winding up of the affairs of the LLP the sum of not less than £5 million. Failure to lodge the bond will remove the innocent partners from the personal liability protection and is replaced with the usual joint and several liabilities. The bond need not be in the form of cash, as a host of financial instruments, for example, bills of exchange and promissory note are accepted. To the Jersey authorities, the bond requirement represents a necessary measure of balance in the legislation and is not a new concept as it is similar to the bond conditions found in the American state LLP legislative scheme, and the working is similar to the operation of maintenance of capital doctrine in company law. In fact, the structure of the Jersey LLP is basically similar to most US LLP as it has been modeled from the Delaware LLP.

The Jersey LLP is also not subject to the audit requirements. The only disclosure that is required from Jersey LLP is the particulars of partners and business during registration and the condition for the firm's name to bear an indication that it is a LLP. Pertaining to the limitation of liabilities of partners, the Jersey LLP Law 1997 contained provisions, which are designed to oust the operation of joint and several liabilities. The law also protects innocent partners' personal assets from seizure following a successful claim against the firm. The 'innocent partners' are also not liable for the debt or loss of the company caused by the act of another partner in the partnership. Nonetheless, a partner of the LLP who caused loss to the firm due to a default committed within his authority or in his personal capacity will be personally liable for the debts. This means, restrictions on partner's personal liability in Jersey LLP do not apply to partner's personal debts or business loss caused by his own default.

For the creditors, the main protection is the £5 million financial provision requirement, which must be surrendered upon registration of the LLP. The law also provides the "claw back mechanism" that any partner of the Jersey LLP who withdraws LLP property including profits at time when the LLP is unable to pay its debts shall be personally liable for any debts or loss of the LLP equivalent to the amount of the withdrawal. A similar sanction is applied if the partner withdraws LLP property during a period of six months preceeding the time when the LLP becomes unable to pay its debts. These restrictions mainly seek to prevent misappropriation of LLP property by the partners during or shortly before its insolvency.

Referring to the Jersey laws on LLP, it is apparent that the LLP is more akin to partnerships rather than to a company; except for the attribute as a legal entity which automatically bestow it the attributes similar to a company.

The body corporate LLP

The second type of LLP is the LLP with a body corporate status. Examples of this LLP are the UK and Singapore's LLPs. An interesting feature of the second LLP is that although it has the status of a body corporate; its internal regulation is via partners' agreement, which is akin to a partnership agreement. This means partners of LLP may adopt any forms of internal arrangement, which they prefer. Nonetheless, when it comes to external obligations, LLP is subjected to similar requirements applicable to companies such as reporting and disclosure requirements.

One important principle to be highlighted is that despite adopting the internal regulation, which is similar to a partnership, the UK LLP Act 2000 and the Singapore LLP Act 2005 clearly provides that the partnership law is not applicable to the LLP whilst the company law is expressly (unless otherwise provided) applicable to the LLP.

Another interesting feature of the incorporated LLP is its tax status. Although it has the status of a body corporate and subjected to the company law, the LLP is treated as a partnership for tax purposes.

The safeguard mechanism for the creditors in incorporated LLP is not in the financial provision upon registration but on the "claw back mechanism" whereby upon winding up, past or present members of the LLP will be liable to contribute to the assets of the LLP in respect of any property withdrawn from the LLP within specified period preceding the commencement of the winding up, if it can be shown that at the time of the withdrawal, the LLP was insolvent. This means, before making withdrawals, members need to be cautious of the possible consequences in the event of insolvency. This restriction on withdrawals will act as an assurance to potential creditors that the assets shown in the published balance sheet will not be depleted.

Observation

Fascinating facts about the two types of LLPs is that although both are recognized as legal entities, the incorporated LLP has the status of a body corporate whilst the other type of LLP is a legal entity which is not a body corporate. As such, the incorporated LLP is subjected to the company laws whilst the latter are not subjected to the company law.

There is also a difference in the safeguard mechanism. For example, in the Jersey LLP, there are double protection for the creditors; the “financial provision requirement” and the “claw back mechanism” whilst in the incorporated LLP, the safeguard mechanism for the third parties is only the claw back mechanism.

There are also differences pertaining to reporting requirements. For example, in the Singapore LLP, there is a statutory duty to lodge the annual declaration of solvency/insolvency to the registrar whilst in the Jersey LLP, there is no reporting requirement imposed. Nonetheless, in both LLPs, there is no duty to submit audited accounts to the registrar though they are required to keep accounting and other records which are sufficient to indicate transactions and financial position of the LLP and which give a true and fair view of the state of affairs of the LLP.

As regards to limitation of liabilities, partners of both types of LLPs will not be held personally liable for any business debts incurred by the LLP. However, the partners could be held liable for claims from losses resulting from his wrongful act or omission.

Differences between LLP and a limited liability company

The main difference between the LLP and a limited liability company lies in the internal governance structure; whereby a company is strictly regulated by the Companies Act whereas the LLP is govern by a contractual agreement between partners/members. The LLP also have lesser compliance requirements as compared to a company, whereby for registration, it is not required to submit legal documents similar to Memorandum and Articles of Association. LLP is also not required to submit its audited account to the registrar.

The tax regime of LLP is also totally different from a company as LLP is taxed similar to a partnership. Other than the tax status, internal regulation, registration and

disclosure requirements, LLP is very much similar to a company. Both entities have separate legal entity distinct from its members and enjoy attributes as a legal person, such as ability to own property, enter into legal proceedings and perpetual succession.

Differences between LLP and a partnership

The main difference between the LLP and a partnership is that in both types of LLP, the members or partners are not personally liable for the business's debts and liabilities. Creditors of the LLP cannot go after the members' or partners' personal assets to pay off the LLP's debts. In partnership structure, all partners have unlimited liability for the business debts to the extent that their personal assets could be claimed by the creditors if the business assets are not sufficient to pay the creditors.

It also important to highlight that in a partnership, all partners are liable, jointly with all the other partners and also severally for all acts of the firm done while he is a partner but in a LLP, liabilities of the partners or members are limited to his agreed contribution. In addition, due to its legal entity, partners or members of LLP are only agent to the LLP and not to one another. As such they are not liable on account of the independent or unauthorized acts of other partners, thus allowing individual partners to be shielded from joint liability created by another partner's wrongful acts or misconduct.

Despite having different liability regime, LLP and partnerships are almost identical when it comes to internal regulation and taxation. In both types of business entities, the internal affairs are regulated via an agreement between the partners or members. There is no formal constitution such as the Memorandum and Articles of Association which determined how the internal relationships should be governed. Members and partners in LLP enjoy the internal flexibility similar to partners in a partnership. In relation to taxation, both partners and members of LLP and partnerships report business income or losses on their personal tax returns; the business itself does not pay tax on the income.

Labuan limited liability partnerships (LLLP)

Under the LP and LLPA 2010, any two or more persons may form a Labuan limited liability partnership for any lawful purpose. An individual or a corporation may be a partner in a Labuan limited liability partnership.

Registration

To register a Labuan limited liability partnership, the designated partner shall submit all relevant documents to the authority and accompanied by the prescribed fee as may be specified by the authority. The name of a Labuan limited liability partnership shall end with the words “Labuan limited liability partnership” in full or the abbreviation “(Labuan) L.L.P.” or “(Labuan) LLP” or any other form of abbreviation in romanised character or words in the national language of a country which connotes a limited liability partnership or any abbreviation thereof as may be approved by the authority.

A Labuan LP may convert to a Labuan LLP provided that the partners are all existing partners of the LP and consists of no new partner. A Labuan company may convert to a Labuan LLP provided that there is no security interest in its assets subsisting or in force at the time of application and the partners of the Labuan limited liability partnership to which it is to be converted comprises all the shareholders of the Labuan company and consists of no new shareholders.

Upon registration, the Labuan limited liability partnership shall be a body corporate and has legal personality separate from that of its partners. It shall also enjoys perpetual succession have all the powers of a natural person. Similar to a company, Labuan LLP is capable of suing and being sued, acquiring, owning, holding and developing or disposing of property, both movable and immovable and having a common seal under its own name. Any change in the partners of a Labuan limited liability partnership shall not affect the existence, rights or liabilities of the Labuan limited liability partnership.

Liability of partners

As a legal entity, Labuan LLP shall be liable for its own debts arising in contract, tort or otherwise. The liabilities of the Labuan limited liability partnership shall be met out of the property of the Labuan limited liability partnership.

A partner is not personally liable, directly or indirectly solely by reason of being a partner of the Labuan LLP. However, the protection of limited liability shall not be applicable for personal liability of a partner in tort for his own wrongful act or omission. In such as case, the LLP is liable to the same extent as the defaulted partner. This means the third party can make a claim against the defaulted partner and the LLP.

In the Labuan LLP, every partner is the agent of the LLP and accordingly, the acts of a partner in the partner's capacity as a partner shall bind it. However, the LLP shall not be bound by any act of the a partner with the third a party if the partner has in fact no authority to act for the LLP and the person knows that the partner has no authority or does not know or believe that partner to be a partner LLP.

Internal regulation

The mutual rights and duties of the partners inter se and between the LLP with its partners are mainly govern by the partnership agreement. Only in the absence of an agreement that such matter shall be referred to the Labuan LP and LLP Act 2010.

In the Labuan LLP there must be at least one designated partner. A partner may become or ceased to be a designated partner by and in accordance with an agreement with the other partners. A designated partner shall be responsible for all acts required to be done by him under the Act and shall be personally liable to all penalties imposed on the LLP for any contravention of Parts IV and V of the Act unless the court decided that he should not be liable.

Dissolution

The LP an LLPA 2010 clearly stated that in the case of receivership of a Labuan limited liability partnership, the provisions of Part VIII (in so far as they relate to a company

limited by shares) of the Companies Act 1965 shall apply and in the case of winding-up of a Labuan limited liability partnership, the provisions of Part X (in so far as they relate to a company limited by shares) of the Companies Act 1965 and the Companies (winding-up) Rules 1972, or section 68 shall apply. As such, it is apparent that laws applicable to receivership and winding up of the Labuan LLP are the company law. However, different from a company, a partner in Labuan LLP may dissolve the LLP by giving notice of dissolution provided that the LLP has ceased to operate and has discharged all its debts and liabilities. This method is akin to a partnership structure. Nonetheless, the notice of dissolution is not an absolute method of dissolution as in a partnership but a ground to apply for dissolution by the authority.

Taxation

Similar to the Labuan LP, Labuan LLP is categorized as Labuan entity and therefore, shall be the person assessable and chargeable to tax under the Act. In Labuan, tax shall be charged at the rate of three per cent for a year of assessment upon the chargeable profits of a Labuan entity carrying on a trading activity for the basis period for that year of assessment whilst a Labuan entity carrying on non-trading activity for the basis period for a year of assessment shall not be charged to tax for that year of assessment.

Relevant laws

The Labuan LP and LLP Act 2010 clearly provides that the rules of equity and of common law applicable to partnership shall continue to be applicable to a Labuan limited partnership, except in so far as they are inconsistent with the express provisions of the Act but shall not apply to a Labuan LLP. The Act also expressly stated that provisions of the Partnership Act 1961 shall not be applicable to both Labuan LP and Labuan LLP.

Observation

The Labuan LP and LLP Act 2010 is a unique legislation as it regulates two business entities under one statute. This is the first statute in Malaysia which functions in such a manner. As regards to limited partnerships, it is observed that the Act does not change the previous structure of Labuan offshore limited partnership except for the tax status.

As regards LLP, the Act is seen to deviate from the UK offshore LLP as it adopts the body corporate LLP. The Labuan LLP is akin to the Singapore and UK LLP as regards to attributes, structure and regulations. However, as regards to the tax status, Labuan LLP seem to deviate from the normal attribute of other body corporate LLP which adopts partnership tax status and has its own signature to be tax as Labuan business entity.

The Labuan LP and LLP Act 2001 has expanded the option of business entities in the Malaysian offshore and this is seen as a smart way to attract more business and investment to Labuan as a international business and financial centre.

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